

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**PRE-CAST SPECIALITIES, INC.**

**Employer,**

**and**

**CONSTRUCTION AND CRAFT WORKERS  
LOCAL UNION No. 1652**

**Petitioner.**

**Case No. 12-RC-139665**

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
HEARING OFFICER'S REPORT ON OBJECTIONS AND  
RECOMMENDATION TO THE REGIONAL DIRECTOR**

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## **I. INTRODUCTION**

Pursuant to Section 102.69(e) of the Board's Rules and Regulations, Pre-Cast Specialties, Inc. ("PCSI"), by and through the undersigned counsel, hereby files this Brief in Support of its Exceptions to the Hearing Officer's Report on Objections, as issued in the above-styled matter on February 11, 2015. As set forth herein, the overwhelming weight of evidence establishes that the Region's failure to fulfill its agreement to supply a Creole-speaking interpreter was per se objectionable misconduct, and further that such misconduct had a tendency to and did in fact induce voter confusion so as to call into question the validity of the underlying election results. More importantly, the undisputed facts in this case cast reasonable doubt upon the fairness and validity of that election. For all those reasons, the Employer respectfully submits that the Board must overturn the Hearing Officer's Report on Objections, sustain those Objections, and issue an Order setting aside the election and scheduling a new one.

## **II. PROCEDURAL BACKGROUND**

The Union filed the underlying representation petition on October 28, 2014. (GC Ex. 1(a)). As stipulated into the record, the Region agreed to furnish a Creole-speaking interpreter for the election in response to the Employer's request. (*See* Tr. p. 23). The ensuing representation election was conducted on December 9, 2014, without the benefit of the agreed-upon interpreter. (*Id.*). A majority of ballots were subsequently cast in favor of representation.

On December 16, 2014, PCSI timely filed Objections to conduct affecting the results of the election, contending in part that the absence of a Creole-Speaking interpreter destroyed the necessary conditions for a valid election. (GC Ex. 1(d)). On December 30, 2014, Regional Director Margaret J. Diaz issued a Report on Objections and Order Directing Hearing to resolve the issues raised by the evidence presented. (GC Ex. 1(f)). A hearing on the Objections was

held on January 16, 2015. During that hearing, PCSI withdrew Objections 1-5, 7, and 8, and proceeded with the presentation of testimonial and documentary evidence in support of Objections 6, 9, and 10. Additionally, at the hearing, PCSI and the Region entered into a Stipulation that states:

In response to a request from the Employer, who asserted that a majority of the employees in the requested voting unit are of Haitian nationality, most of whom do not understand or read English, the Region agreed to have the official ballots and notices of election in English, Spanish and Creole; and *further agreed to contract a Creole-speaking interpreter to be present for the December 9<sup>th</sup>, 2014 representation election.* The interpreter, however, did not show up for the election at any point during the polling period.

(Tr. p. 23) (emphasis added). Both parties filed post-hearing briefs on January 26, 2015.

On February 11, 2015, the Hearing Officer issued his Report on Objections, in which he concluded that there was insufficient evidence to show that the absence of an interpreter raised reasonable doubt as to the fairness and validity of the election. Consequently, he recommended that Objections 6, 9, and 10 be overruled and that a certification be issued.

As explained more fully below, the election results must be set aside, and a new election scheduled, as the Region's failure to fulfill its agreement to secure a Creole-speaking interpreter during the election was a critical error that disrupted the laboratory conditions necessary to assure the effective and informed expression of the voters' desires.

### **III. FACTUAL BACKGROUND<sup>1</sup>**

PCSI is engaged in the production and distribution of precast, pre-stressed concrete products through the operation of a 46-acre production facility in Pompano Beach, Florida.

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<sup>1</sup> The Hearing Officer incorrectly excluded evidence from the record, suggesting in his Report that "omitted testimony or evidence is either irrelevant or cumulative." (See Report p. 3). This assertion is erroneous as set forth further herein.

(Tr. p. 27).<sup>2</sup> In furtherance of this operation, PCSI employs approximately 220 to 230 employees, 180 to 190 of whom serve in a production capacity. (Tr. p. 28). Seventy to seventy-five percent of these production employees (126 to 143) speak Haitian Creole as their primary language, with the remaining employees speaking primarily Spanish or English. (Tr. p. 30, 102-03).<sup>3</sup> Of the vast majority of unit employees who primarily speak Creole,<sup>4</sup> no more than 20 to 25 are fluent in English, while a few others understand French. (Tr. p. 31, 115, 153).

Even though Creole is the first language of an overwhelming majority of the bargaining unit, only about 40 of these employees are capable of reading it. (Tr. p. 34, 46, 104). Employer witness Stepha Gesner – who has worked for PCSI for 12 years – specifically testified that while “[t]hey speak Creole. Not all of them can read Creole.” (Tr. p. 174). In support of this statement, Ms. Gesner testified:

- Q: Okay. Well, when did they tell you they don’t read Creole?  
A: Sometimes when they give – sometimes when they give them a paperwork they might come to me and ask me, can you read that for me.  
Q: And that paper would be written in Creole?  
A: Yes.

(Tr. p. 193). Throughout the proceeding, PCSI offered unrebutted testimony that Creole and French are vastly different languages. (Tr. p. 63). Yet when questioned about his Creole-speaking coworkers’ ability to read Creole, Union Observer Andre Auguste – who has less than two years of experience with PCSI – offered only the following conclusory remarks:

- Q: And all of your Creole-speaking coworkers, do all of them read Creole as well as speak it?  
A: Sure. They read Creole.  
Q: Every single one?  
A: They can read French. They can read Creole.

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<sup>2</sup> Testimony from the objections hearing will simply be cited as “(Tr. \_\_\_\_).”

<sup>3</sup> Employer’s Exhibit 8, which was rejected, contains a list of the 193 employees and their primary language.

<sup>4</sup> There was unrebutted hearing testimony establishing that there are many forms of Creole; however, “Creole” as used in this brief refers to Haitian-Creole. (See Tr. p. 90).

(Tr. p. 200, 215).

Employer witness Kerlande Valbrun, PCSI's Human Resources and Accounts Payable Coordinator, offered extensive testimony on the origins of Creole, which is necessary to fully appreciate the significance of the interpreter's absence. Ms. Valbrun, whose parents and husband are Haitian, is fluent in Creole and has been exposed to the language her entire life. (Tr. p. 90). She learned to fluently speak Creole twenty years ago, and has since learned to read and write it. (Tr. p. 90, 153-154). Ms. Valbrun made clear that Creole is a language that varies substantially by geographic region. (Tr. p. 91-92). Consequently, there are at least three separate dialects of Creole: Gonaives; Cap-Haitien; and Port-au-Prince. (Tr. p. 92).

These dialects not only have different drawls, but they also have different concepts for each word. (Tr. p. 93). As an example, Ms. Valbrun provided the variations on how a person would say "no" in each of these dialects. (Tr. p. 156). More importantly, these variations are exemplified in the differences in wording on the two sample ballots that were revealed during the hearing. (Tr. p. 160-162; Petitioner Ex. 1 and Employer Ex. 7). This is because Creole was a language that was spoken at home, but not taught in Haitian schools until the late 1980's and early 1990's. (Tr. p. 95, 105, 123). As a result, Creole does not easily lend itself to written translation. (Tr. p. 95).

This was illustrated several times during the hearing, when despite her own literacy, Ms. Valbrun evidenced difficulty reading documents that were translated into Creole, including the actual ballot that was used in the representation election. (*See* Tr. p. 122; 126; 129 - 130). The record evidence confirms that an employee who was not schooled in Creole typically cannot read Creole. (Tr. p. 96, 105; 123; 162). Further, an employee's ability to understand one Creole dialect does not necessarily mean that he or she will be able to understand another. (Tr. p. 97).

Consequently, during captive audience meetings preceding the election, Ms. Valbrun had to turn to a professional interpreter to assist her in answering a Creole-speaking employee's question about the sample ballot. (Tr. p. 149).

For that reason, PCSI relies on an on-site resource to effectively communicate with Creole-speaking employees regarding their day-to-day issues and concerns. (Tr. p. 45-46). Ms. Valbrun has served in that role for approximately two-and-one-half years. (Tr. p. 88). Her ability to communicate with employees in Creole was a key factor in PCSI's decision to bring her back in 2014. (Tr. p. 44-45).

In her capacity as H.R. representative and in-house interpreter, Ms. Valbrun interacts with PCSI's Haitian workforce in a variety of ways, ranging from serving as a conduit for supervisory communications, to answering benefit-related questions, to filling out new-hire paperwork. (Tr. p. 98). Along the way, she has observed that many PCSI employees cannot read Creole. She explained the basis for her largely un rebutted statements as follows:

A: Because when they come to the office, I would hand them a document in English, at first, and then they would say, I can't do this. So I take – immediately take it back and either private – provide it to them in Creole. And I'll step away and come back, and the document is still left there blank, or they don't know what the document says. But to avoid embarrassment, I immediately take the form or document and start explain to them what it is. And that's how I know that they can't read and write Creole.

(Tr. p. 105; *see also* Tr. p. 108, 157). Upon receiving forms that had been translated into Creole, Ms. Valbrun explained that many Creole-speaking employees would ask her to fill them out for them. (Tr. p. 110). Curiously, the Hearing Officer chose to disregard this un rebutted testimony, solely on the basis that Ms. Valbrun was not formally qualified as an "expert" on the Creole language.

In an effort to bridge the communication challenges imposed by these demographics, PCSI frequently translates its written materials into Creole. (Tr. p. 35). For example, PCSI offered unrefuted testimony that it routinely translates documents such as its employee handbook and other new-hire documents into Creole. (Tr. p. 36; Employer's Exs. 2 and 8). Moreover, PCSI has a longstanding practice of making interpreters available to its Creole-speaking population, particularly where those employees would be called upon to fill out important documents. (Tr. p. 40). Business Operations Manager Erin Currin testified that PCSI consistently utilized Creole-speaking interpreters for open enrollment meetings, discussions regarding employee benefits and insurance coverage. (Tr. p. 40; 42).<sup>5</sup>

During the laboratory period leading up to the election, PCSI engaged in a communications campaign designed to educate employees on the representation process. (Tr. p. 47). Over the course of this campaign, PCSI distributed written materials regarding the Union and the election process, all of which were translated into Creole. (Tr. p. 47, 49; Employer Exs. 5 and 6).<sup>6</sup> PCSI even presented an informational video that was dubbed into Creole. (Tr. p. 48). Over the course of its educational campaign, PCSI held 24<sup>7</sup> separate captive audience meetings, 16 of which were interpreted into Creole by an outside interpreter. (Tr. p. 47, 49-50). Mr. Gesner described the critical role played by this interpreter during these meetings:

Q: Did you attend the meetings that were for the Haitian speaking employees – Haitian-Creole speaking employees?

A: Yes. They used to have a meeting for Spanish workers and also for us, and they used to have a Haitian-Creole speaker to translate for us.

...

Q: How was this interpreter helpful during those meetings?

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<sup>5</sup> These interpreters were provided by third-party vendors to ensure that PCSI employees fully understood the significance of the forms they were being asked to complete. (Tr. p. 40-43).

<sup>6</sup> During the hearing, Petitioner's Business Manager Thomas Mathews testified that Petitioner utilized a Creole-speaking interpreter for its own meetings with unit employees, including one that took place on December 6, 2014. (Tr. p. 228).

<sup>7</sup> PCSI conducted four separate sessions, each of which was presented to six different employee groups: one English-speaking; one Spanish-speaking; and four Creole-speaking. (Tr. p. 50).

A: That means when we don't understand something, the interpreter translate for us.

(Tr. p. 176). During these meetings, employees often directly engaged in question-and-answer sessions with the outside interpreter. (Tr. p. 47, 52-53). In meetings that took place on or around November 20, 2014, PCSI explained the election process and reviewed a sample ballot with the assistance of this same interpreter. (Tr. p. 54; *See* Employer's Ex. 7). Even after the interpreter explained the significance of the ballot in Creole, many employees lingered long enough to ask him additional questions about the ballot. (Tr. p. 151).

As established through un rebutted hearing testimony, PCSI had an extensive history of utilizing outside Creole-speaking interpreters in conjunction with the review of insurance and related forms impacting employment terms and conditions. (*See* Tr. p. 40, 42). For day-to-day communications, the Employer relied upon the Creole-speaking skills of its own H.R. representative to assist in resolving day-to-day employee issues. (*See* Tr. p. 45-46). Clearly, the 70%-75% of unit employees who spoke Creole as a first language (many of whom spoke no other language and were not literate in their native language) were conditioned to rely upon the assistance of an interpreter in making employment decisions of consequence.

In keeping with its long-standing history of making one available under similar circumstances, PCSI supplied a Creole-speaking interpreter to help employees understand how to properly cast their election ballots. (Tr. p. 67-68). Not surprisingly, PCSI advised the Region that a majority of eligible voters were Haitian nationals whose primary language was Creole, and that an outside interpreter would be needed to facilitate communications with these employees once inside the polling area. (Tr. p. 23). In response, the Region agreed to provide the official ballots and notice of election in English, Spanish, and Creole, and further agreed to furnish a Creole-speaking interpreter for the election itself. (Tr. p. 23).



On December 9, 2014, at approximately 1:00 p.m., a pre-election conference was convened in the polling area at PCSI. (Tr. p. 60, 62). Ms. Currin, PCSI's Labor Counsel Charles Caulkins, Union Representative Thomas Matthews, Union President Andre Rolle, Union Observer Andre Auguste (who speaks Creole), Company Observer Stepha Gesner (who also speaks Creole), and NLRB Election Officer Ricardo Morillas<sup>8</sup> (who does not speak Creole) were present. (Tr. p. 60-61). Approximately 15 minutes into the meeting, Ms. Currin asked Mr. Morillas if the interpreter was in route. (Tr. p. 62). Mr. Morillas then called to ascertain the interpreter's whereabouts, and subsequently informed those present that although the interpreter had mistakenly gone to the Region's Miami office, she was now in route to PCSI. (Tr. p. 62). In the meantime, Mr. Morillas offered to overcome any language barrier with his limited French language skills, which is not the same as Creole. (Tr. p. 63). Consequently, the polls opened at 1:30 p.m. without the benefit of an interpreter. (Tr. p. 63, 204).

During the election, the facts show that employees stood in line and entered the polls two at a time. Once voters entered the polling area, they approached Mr. Morillas, who held the door to the entrance. (Tr. p. 183). Mr. Morillas asked each employee his name in order to confirm their eligibility. (Tr. p. 181).<sup>9</sup> Mr. Gesner testified that, when asked for their names by the Board Agent, many of the Creole-speaking employees did not understand. (Tr. p. 181, 186). In these situations, Mr. Gesner and Mr. Auguste were forced to intervene by asking employees for their names in Creole. (Tr. p. 181, 184, 186). After voters provided their names, Mr. Gesner and Mr. Auguste checked them off on their respective lists. (Tr. p. 186). Thereafter, the Board Agent provided a ballot to each employee from his position at the door while explaining the voting procedure in English and, sometimes Spanish. (Tr. p. 210, 214).

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<sup>8</sup> Please note that, although the transcript spells his last name as Morillis, the proper spelling is Morillas.

<sup>9</sup> Mr. Auguste claims that he and Mr. Gesner were tasked with asking employees for their names. (Tr. p. 207-208).

During the hearing, Mr. Auguste testified to Mr. Morillas' communications with employees in the polling area:

Q: Did he speak to them in any language in particular as he was giving them their ballots?

A: Some in Spanish, I think. He speak a little bit of Spanish to them. Yeah I believe in Spanish, to explain to them how to vote.

...

Q: How did he communicate with your Creole coworkers?

A: Him?

Q: Yeah.

A: He don't have that much Creole. He don't have that much Creole.

Q: So –

A: The only thing he told them in English. So whatever he got – he explain to with that ballot, he go just like that, you got your choice.

(Tr. p. 214). The Observers were prohibited from communicating with employees once they received their ballots. (Tr. p. 204-205, 218). Consequently, many of the voters “didn't know what to do.” (Tr. p. 195). Mr. Gesner testified to mass confusion that ensued among Creole-speaking voters:

A: A lot of – a lot of those Haitians, they don't know what to do. They don't know . . . how to vote – the voting process is. The representative give them the paper. The representative just give them the paper and talk to them. When they give – when they give them the paper, that person need a person to – another person to translate for him. But he doesn't know what to do. Me and Andrew – Andre, we could not tell the person what – what to do. But it was the representative to ask – to tell the person what to do. The person would need a person – another person to translate for him. And then the -- the representative give him the paperwork. The voter, even though he doesn't understand what – what is on the paperwork, he has to use the paper even though he doesn't know what to do with – with the paper.

(Tr. p. 183).<sup>10</sup>

PCSI management and the employees themselves expected a Creole-speaking interpreter to be present within the polling area throughout the election. (Tr. p. 59). Unfortunately, the interpreter failed to show up at any point during the ensuing two-and-one-half hour polling

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<sup>10</sup> It is worth noting that this testimony went largely unrebutted and that the Hearing Officer chose not to expressly discredit it.

period. (Tr. p. 23). The Region's failure to secure the presence of an interpreter impacted approximately half of the voting population, who had previously established that they require close support and interpretive guidance from Creole-speaking individuals. (Tr. p. 65).

#### **IV. ANALYSIS**

For the reasons set forth below, the Employer excepts to the Hearing Officer's erroneous findings of fact and conclusions of law, which taken together ignore the fact that the underlying election must be set aside solely by virtue of the Region's failure to fulfill its agreement to furnish a Creole-speaking interpreter. PCSI also excepts to the Hearing Officer's erroneous finding that the absence of such an interpreter failed to result in confusion among the electorate, let alone that it had a tendency to do so. Lastly, PCSI excepts to the Hearing Officer's inexplicable conclusion that findings failed to cast reasonable doubt upon the fairness and validity of the election itself.

In making his findings, the Hearing Officer disregarded overwhelming and substantially un rebutted record evidence establishing the potential for mass confusion against the backdrop of an overwhelming majority of eligible voters who: (1) speak Creole as a first language; (2) are not fluent in the only two languages (English and Spanish) that were spoken by the assigned Election Officer; (3) are not sufficiently literate in their native language to read any one of the three Creole dialects; and who, (4) were historically conditioned to rely upon the assistance of an interpreter when called upon to review and complete paperwork pertaining to the terms and conditions of their employment. The Hearing Officer compounded these errors by opting to disregard the testimony of the only witness (Mr. Gesner) to offer factual details pertaining to the conduct of voters within the polling area, despite the fact that he never made any credibility findings with respect to that testimony.

Taken together, the overwhelming amount of record evidence operates to cast a reasonable doubt as to the fairness and validity of the underlying election, which as set forth below is the most onerous burden that can be imposed on PCSI in this case, to the extent that its Objections squarely call the Board's (as opposed to Petitioner's) conduct into question. Remarkably, however, the Hearing Officer managed to erroneously impose a more stringent burden of proof that applies only when the conduct of a party is at issue. For this reason as well, the Hearing Officer's Report and Recommendations must be overturned, and the results of the underlying election set aside. These arguments are addressed in turn below.

**BASED ON PCSI'S LARGE CREOLE-SPEAKING POPULATION AND THE TESTIMONIAL EVIDENCE  
PRESENTED AT THE HEARING, THE ABSENCE OF THE INTERPRETER IRREFUTABLY CAST  
SUBSTANTIAL DOUBT UPON THE FAIRNESS AND VALIDITY OF THE ELECTION  
(Exceptions 6, 9, and 10)**

The Hearing Officer specifically found that: (1) the majority of the voting populace spoke Haitian Creole as a primary language; (2) PCSI utilized an in-house interpreter to communicate with employees and would often bring in third-party interpreters to assist in areas of importance; and, (3) the Region expressly agreed to contract for the presence of a Creole-speaking interpreter who failed to show up for the duration of the election. (Report p. 4-5).

The Hearing Officer, however, misapplied the standard for setting aside an election where the alleged misconduct is attributed to the Board agents, rather than to Petitioner. Additionally, he disregarded overwhelming and unrebutted evidence proving that a substantial number of Haitian unit employees were unable to read Creole and were understandably confused during the election, thereby compounding the Region's misconduct in failing to secure the presence of an interpreter who could resolve such confusion, pursuant to its agreement with PCSI. These findings ignore key record evidence and represent an improper deviation from Board precedent.

**1. The Hearing Officer Applied an Incorrect Burden of Proof.**

In his Report, the Hearing Officer applied an improper burden of proof in erroneously concluding that PCSI's objections should be overruled. To set aside an election "[w]here conduct is attributable to a Board agent, the question is whether 'the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election.'" *Durham School Services, LP*, 360 NLRB No. 108, Slip. Op. at 4 (2014) (citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F. 2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010, 90 S. Ct. 570, 24 L. Ed. 2d 502 (1970)) (emphasis added); *see also Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42, Slip Op. at 1 (2012), *enfd.* 477 Fed. App'x. 743 (D.C. Cir. 2012). This is not an onerous burden.

Nevertheless, the Hearing Officer erroneously stated that, in determining whether to set aside an election, the Board considers "whether a party's conduct has 'the tendency to interfere with employees' freedom of choice.'" (See Report, p. 2). It is well established that this standard applies only when the conduct of a party is at issue. *See Durham School Services, LP*, 360 NLRB No. 108, Slip. Op. at 4. The evidence in this case shows that the Board's failure to provide a Creole-speaking interpreter, where the majority of the electorate speaks (but does not necessarily read) one of three Creole dialects, clearly raised a reasonable doubt as to the fairness and validity of the underlying election. Even assuming, *arguendo*, that the burden of proof as set forth by the Hearing Officer is correct, however, the uncontroverted evidence presented in this case would easily meet this standard and call for the election to be set aside.

Moreover, the Hearing Officer also improperly narrowed the scope of his analysis to, "whether the absence of a Haitian Creole interpreter at the election caused such confusion among the voters as to warrant setting aside the results of the election." (See Report, p. 5). Put simply,

that has never been the issue in this case. Rather, the issue is whether the Board (as opposed to the Union) was operating under a duty to fulfill its own agreement to supply an interpreter in response to the Employer's reasonable and proper pre-election request. Even under the more stringent burden that was erroneously imposed by the Hearing Officer, however, the overwhelming weight of record evidence established that the absence of an interpreter had a tendency to confuse a majority of the electorate.

**2. The Absence of an Interpreter Not Only Raised a Reasonable Doubt as to the Fairness and Validity of the Election, But in Fact Destroyed the Laboratory Conditions Necessary to Conduct a Fair and Proper Election.**

The Hearing Officer improperly disregarded record evidence showing that the Region's failure to provide a Creole-speaking interpreter disrupted the laboratory conditions necessary to assure the effective and informed expression by all employees of their voting desires. Imagine, if you will, a workforce that is comprised primarily of Creole-speaking employees. Because of the large Creole-speaking population, the employer makes it a point to regularly secure the presence of a Creole-speaking interpreter for employees to ask questions – whether in reference to day-to-day operations or relating to insurance coverage and other benefits. (*See* Tr. p. 40-43).

Subsequently, a representation petition is filed and in response, the Employer contracts for the presence of a Creole-speaking interpreter at every informational meeting involving Haitian unit employees. (*See* Tr. p. 47-50). In its own attempt to overcome this language barrier, Petitioner also provides unit employees with an interpreter during pre-election meetings. (*See* Tr. p. p. 228). Election day arrives and these Creole-speaking employees stand in line to enter the polling area. Upon entering, they encounter three individuals – a Board Agent who does not speak Creole and two Creole-speaking Observers who are specifically instructed to refrain from interaction with voters following their self-identification. (Tr. p. 204-05, 214).

These employees are then asked their names in Creole by the two Observers. (*See* Tr. p. 207-208). Thus, these employees are only able to effectively express themselves for the first few seconds of the voting process.

Immediately thereafter, however, they are approached by an Election Officer who hands them a voting ballot and instructs them on voting procedures in English – a language that most of them do not understand. (*See* Tr. p. 201, 214). At this point, they are not allowed to speak with the Creole-speaking Observers, effectively stripping them of any opportunity to engage in meaningful dialogue for purposes of resolving any possible confusion. (*See* Tr. p. 205). The voters are then presented with a ballot containing multiple languages, one of which purportedly is Creole (or at least one of three geographic dialects), and which contains apparent inconsistencies with other aspects of a posted election notice that one employee witness testified was scarcely read. (*See* Tr. p. 159-163).

This scenario not only gives rise to the possibility of mass confusion – it effectively guarantees it. This is precisely the scenario that confronted approximately 140 Creole-speaking employees during the representation election. Yet the Hearing Officer strains all aspects of credulity (let alone common sense) by concluding that “these facts [do not] demonstrate[] the absence of the interpreter tended to cause confusion.” (*See* Report p. 9). As further explained below, the majority of the electorate were clearly deprived of an effective and informed opportunity to express their preferences when voting in this election and, for that reason alone, the laboratory conditions did not meet the required standard for a fair election.

**3. The Board’s Long-Standing Decision in *Gory* Controls the Standard for Determining Whether an Election Should be set Aside in the Absence of an Interpreter.**

In conducting representation elections, the Board must maintain and protect the integrity of its voting procedures. *See, e.g., Glacier Packing Co.*, 210 NLRB 571 (1974). Election conditions must approach, as nearly as possible, ideal “laboratory” conditions so as to facilitate expression of the uninhibited desires of employees. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

It is now well-established that the absence of an interpreter, even if only for a brief portion of the election, serves as an “objectionable failure to assure the effective and informed expression by all employees of their voting desires.” *Gory Assoc. Inc.*, 275 NLRB No. 179 (1985).<sup>11</sup> *Gory* is controlling precedent that has never been overturned, and for that reason alone the Hearing Officer was duty bound to apply its holding to the facts of this case. *See, e.g., Hillhaven Rehabilitation Center*, 325 NLRB 202, 202 n. 3 (1997) (“It is . . . well established that the judge has a duty to apply Board precedent.”); *Waco, Inc.*, 273 NLRB 746, 749 n. 14 (1984) (“It is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed.”) (*citing Iowa Beef Packers*, 144 NLRB 615, 616 (1963)).

In *Gory*, the Creole-speaking interpreter failed to arrive at the polling place until half-way into the election. Twelve percent of the bargaining unit in *Gory* was comprised of Creole-speaking employees. Consequently, the employer filed objections and asked that the election be set aside on that basis alone. The Board agreed, finding that “the circumstances of this election raise a substantial doubt as to whether the voters were afforded an effective and informed expression of their preferences.” *Id.* at n. 1.

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<sup>11</sup> This case also had its genesis in a representation election administered by the Miami Resident Office of Region 12.



Under the *Gory* analysis, the instant election must be set aside because the absence of a Creole-speaking interpreter through the entire election (let alone a portion of it) deprived an overwhelming majority of unit of an effective and informed expression. It is unrefuted that 70-75% of PCSI employees speak only Creole. Consequently, the Region agreed with PCSI to provide a Creole-speaking interpreter at the election. (*See* Tr. p. 23).

Approximately fifteen minutes before the start of the election, however, the Election Officer was informed that the assigned interpreter had reported to the wrong location. The polls opened at 1:30 p.m. and closed two-and-one-half hours later. At no point during that period did the interpreter appear, leaving the vast majority of eligible voters without anyone to communicate with them in their native language after they self-identified, let alone to explain the ballot or instruct them on what to do once they received it. (*See* Tr. p. 23).

Here, as in *Gory*, the Haitian Creole interpreter who was scheduled to assist the Election Officer failed to arrive, precluding the Officer from giving intelligible instructions or otherwise assisting the Creole-speaking voters. The absence of an interpreter was felt even more acutely in this case, given the magnitude of the impacted voter population and the duration of the interpreter's absence.<sup>12</sup> As a result, the Creole-speaking employees were deprived of an effective and informed expression of their preference, and for that reason alone the election must be set aside.

The Hearing Officer somehow managed to misconstrue the holding in *Gory*, focusing on *dicta* within a footnote that refers to an "agreement" between the parties. Specifically, he goes to great lengths to point out that the "Union was not asked its position regarding the necessity of an interpreter . . . rather the agreement was between the Region and the Employer." (*See* Report, p. 8).

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<sup>12</sup> It is worth noting that the Region did in fact supply a Creole-speaking interpreter for the hearing on Employer's Objections.

In so doing, the Hearing Officer goes on to erroneously conclude that, “[w]here no agreement was reached, however, the necessity of an interpreter cannot be presumed.” (*See* Report p. 7). This argument, however, misses the point completely. While the *dicta* in *Gory* refers to a pre-election agreement between the parties, this was clearly immaterial to the majority’s decision. Moreover, PCSI’s Objections go solely to the Board’s conduct, and not to the Petitioner’s conduct.

At no point does the Hearing Officer suggest how a formalized “agreement” could have been facilitated between the parties to this matter within the context of a stipulated election. Perhaps that’s because no such mechanism exists following the execution of an election stipulation. Put simply, PCSI approached the Region (rather than Petitioner) to request the presence of an interpreter because the Region was exclusively positioned to furnish one. By subsequently agreeing to supply an interpreter (a fact that is now stipulated into the record), the Region entered into a covenant that it subsequently breached by virtue of its failure to secure that interpreter’s presence on election day.

The Hearing Officer completely disregards this compact, choosing instead to erect the “straw man” of privity between the parties as a litmus test for objectionable misconduct. In doing so, however, he ignores the fact that Petitioner’s role (or lack thereof) in this equation is completely irrelevant to the controlling analysis. Put simply, PCSI objects to the Region’s conduct – and not to Petitioner’s.

Indeed, the Employer has only uncovered a single instance in which the existence of an agreement between the parties to secure an interpreter was deemed relevant, and the facts within that decision are completely inapposite. In *Arthur Sarnow Candy*, 311 NLRB 1137 (1993), the Region expressly *rejected* a pre-election request for the presence of a Creole-speaking

interpreter. Specifically, the employer had requested the presence of Spanish, Portuguese, and Creole interpreters, acknowledging that the “greatest number of unit employees not bilingual at the employer’s facility are Portuguese.” *Id.*

The Region subsequently rejected the request for a Creole interpreter, providing only Spanish and Portuguese interpreters. On that basis, the employer filed Objections that were overruled by the Region. The employer requested a review of the Regional Director’s Supplemental Decision and Certification of Representative, which was denied without explanation, leaving *Gory* intact. *See* 311 NLRB at 1137.

The facts in *Arthur Sarnow Candy*, are completely distinguishable, to the extent that the Region in this case expressly agreed to provide a Creole-speaking interpreter, only to breach that agreement on election day. In further contrast to *Arthur Sarnow Candy*, the majority of voters who are “not bilingual” in the instant case speak Creole, and yet no Creole interpreter was ever provided. Whereas the majority of employees who were “not bilingual” in *Arthur Sarnow Candy* had an opportunity to effectively communicate during the voting sessions, the majority of their counterparts in this case did not.

Contrary to the employer in *Arthur Sarnow Candy*, PCSI provided overwhelming evidence that: (1) Many of its employees cannot read English, Spanish, or Creole; (2) The majority of eligible voters did not speak English; and, (3) Many of those employees were confused by the Election Officer’s inability to speak to them in Creole. Thus, the Board’s finding in *Arthur Sarnow Candy* that there was no evidence of voter confusion is inapplicable to the facts in this case, where the majority of the voters were precluded from effectively communicating with anyone inside the polling area. Not surprisingly, Mr. Gesner testified to mass voter confusion in this case.

The Administrative Law Judge's ("ALJ") unpublished and non-binding decision in *Galaxy Condominium Association*, Case 22-RC-13150, JD (NY)-04-11 (February 3, 2011), is similarly unpersuasive.<sup>13</sup> In *Galaxy*, the Spanish interpreter was between 45 and 60 minutes late to an election that was open for 3 to 4 hours. The evidence indicated that approximately 30% to 40% of employees did not speak English. Additionally, the testimony demonstrated that only about ten employees voted during this time and "these 10 employees 'pretty much spoke both English and Spanish.'" *Id.* Additionally, the interpreter was available for the remainder of the election. As a result, the ALJ determined that the "laboratory conditions" standard had not been violated.

The mitigating factors that were present in *Galaxy* are completely absent here. In stark contrast, the testimony presented at the instant hearing shows that 141 of the 193 eligible voters spoke primarily Creole. Credible hearing testimony also established that the English-and Spanish-speaking employees were provided with instructions in their native language, but the Creole-speaking employees were not afforded this opportunity. Further, although the two Observers were Creole speaking, they were precluded from any interaction with voters beyond asking their names. Irrefutably, all Creole-speaking employees were deprived of interpretive assistance during the voting process, contravening the "laboratory conditions" standard. Therefore, this case falls squarely within the ambit of *Gory*, and for that reason as well the Hearing Officer's report must be overturned, and the election set aside.

#### **4. A Creole Interpreter was Necessary to Assist the Creole-Speaking Employees During the Election.**

The Hearing Officer inexplicably disregards record evidence showing that a substantial percentage of the electorate could not read English, Spanish, or Creole. Record testimony

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<sup>13</sup> ALJ decisions have no precedential value.

clearly established that many of the Creole-speaking employees could not read Creole. Ms. Valbrun testified to her extensive experience with Creole-speaking employees who were simply unable to read translated documents. The Hearing Officer downplays this testimony simply because she admitted that “no employee has ever told [Ms.] Valbrun that he or she is illiterate.” (*See* Report p. 6).

However, Ms. Valbrun provided numerous examples of her personal interactions with employees, during which she had to read Creole materials to them. (Tr. p. 110). As she testified, it is unlikely that any of these employees would admit to being unable to read for fear of embarrassment. (Tr. p. 108-109, 154). Further, the Hearing Officer incorrectly asserted that neither Observer offered more than conclusory statements as to the literacy of their co-workers. (*See* Report p. 8). While that characterization would be accurate with respect to the testimony of Mr. Auguste, Mr. Gesner (who has worked with PCSI’s Creole-speaking employees for twelve years), provided ample support for his assertion that some Creole-speaking employees were unable to read Creole, explaining that many would provide him with Creole documents to read and explain. (*See* Tr. p. 193). Mr. Gesner’s first-hand account of his interactions with coworkers is further supported by Ms. Valbrun’s un rebutted testimony regarding her daily interactions with these same employees. The only reasonable inference that can be drawn from this evidence is that many employees could not read Creole.

Record evidence also established that the ballot, which contained three different languages, was confusing and difficult to read, even for those who were capable of reading Creole. Indeed, Ms. Valbrun (who can read Creole) had difficulty reading the ballot herself. Discrepancies were also revealed in the Creole translations of the two ballots received into evidence. (*See* Petitioner’s Ex. 1 and Employer’s Ex. 7). Nevertheless, the Hearing Officer

noted that, “the adequacy of the translated notices are beyond the scope of the Regional Director’s Report on Objections.” (*See* Report, p. 5). The Hearing Officer misconstrued PCSI’s argument, which goes not to the adequacy of the translation on the ballots, but to the need for an interpreter, given the confusing layout of the ballot and the employees’ inability to read Creole from the printed page.

In *Kraft, Inc. – Retail Food Group*, 273 NLRB 184 (1985), which is analogous to the present case, the Board set aside an election because the ballot was facially defective – the four languages appearing on the ballot were laid out in a fashion that made it difficult for voters to read. Significantly, the fact that eligible voters were presented with sufficient information prior to the election to enable them to intelligently cast their votes was deemed completely irrelevant.

Further, as noted by the Hearing Officer, PCSI would often bring in third-party interpreters to provide Creole-speaking employees with clarification on important employment issues. In fact, during its educational campaign, PSCI relied on a third-party interpreter to relay information about the election to the majority of its Creole-speaking employees. Even the Union acknowledged that it had an interpreter present during its pre-election meetings. Thus, there can be no question that unit employees were conditioned to rely on the presence of an interpreter whenever they were called upon to make important employment decisions and, not surprisingly, those same employees fully expected a Creole-speaking interpreter to be present during the election. (Tr. p. 59, 184).

Once the Creole-speaking employees arrived at the polling area and identified themselves, however, they were deprived of any opportunity to ask questions or seek clarification on the voting process. In fact, the Union’s own Observer testified that the Election Officer explained the process to voters in English and Spanish, but was unable to do so in

Creole.<sup>14</sup> Because the Creole-speaking Observers were effectively cut off from communicating with voters once they received their ballots, the polling area was completely bereft of any vehicle for effectuating meaningful communications with a majority of bargaining unit members thereafter. For these reasons as well, the overwhelming evidence presented at the hearing establishes that the election must be set aside.

**5. The Absence of a Creole-Speaking Interpreter Did Result in Confusion in the Voting Area.**

The Hearing Officer acknowledges that there was contradictory testimony by both Observers about conditions within the voting area. Curiously, however, he chose not to credit the testimony of one over the other. Instead, he goes to great lengths to juxtapose their conflicting testimony, ultimately discarding Mr. Gesner's testimony completely in favor of Mr. Auguste's conclusory testimony.

In fact, Mr. Auguste did not provide any information relating to the environment inside the voting area. Instead, he would have the Board believe that after each employee entered the voting area (192 separate times), he and Mr. Gesner (rather than Mr. Morillas) asked for their names. Mr. Auguste would also have the Board believe that every one of his Haitian co-workers, who he himself acknowledged "don't have much English," freely communicated with an Election Officer who by his own admission did not speak Creole. Mr. Auguste goes so far as to suggest that all of the employees knew what they were doing throughout the polling process, yet he provides no support for any of these bald conclusory assertions. (*See Tr. p. 217*).

On the other hand, Mr. Gesner provided a rich and detailed account of the atmosphere within the polling area that is entirely consistent with PCSI's workplace dynamics. He further

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<sup>14</sup> Although the Election Officer represented that he spoke French, this did not facilitate communications with the Creole-speaking employees. Consequently, Mr. Morillas could not effectively obtain the names of the voters who only spoke Creole.

testified that he and Mr. Auguste only intervened when a Creole-speaking employee did not understand the Election Officer's questions, which is consistent with the Board's stated goal of maintaining orderly laboratory conditions. Mr. Gesner's testimony that Creole-speaking employees' were often unable to understand Mr. Morillas when he asked for their names is supported with the specific example of an employee who did not even know how to enter the voting booth properly, clearly refuting Mr. Auguste's generalized assertions. (*See* Tr. p. 181, 185).

The Hearing Officer acknowledged that: (1) "Some voters did not initially understand when they were asked for their names;" (2) "Some voters may have taken a long time in the booth;" and, (3) "Some voters may have attempted to enter the voting booth through the back." (*See* Report p.9). Yet, he somehow also stated that, "What is missing from the record is *any* evidence that a single voter was confused because there was no Haitian Creole interpreter or was otherwise unable to make an informed choice at the polls." (*See* Report p. 9).

This assertion is clearly refuted by the evidence of conditions in the voting area as fully described by Mr. Gesner and accepted by the Hearing Officer in his Report. (*See* Report p. 9). Furthermore, the overwhelming evidence established that the bargaining unit was conditioned to make important employment decisions in the presence of an interpreter.

#### **6. The Hearing Officer Erroneously Excluded Relevant Evidence.**

The Hearing Officer incorrectly concludes that "omitted testimony or evidence is either irrelevant or cumulative." (*See* Report p. 3). PCSI, however, has already provided multiple examples in which the Hearing Officer inexplicably ignored key record evidence. He also improperly sustained objections to Employer motion to admit its Exhibit 8 into evidence. This



exhibit consists of a spreadsheet listing the primary language spoken by bargaining unit employees, which was used by PCSI to determine how best to communicate with them.

Specifically, the spreadsheet (which was created by Ms. Valbrun) shows that of 193 bargaining unit employees, a total of 141 speak primarily Creole, 34 speak primarily Spanish, and 18 speak primarily English. Counsel for the Region objected to this exhibit on the basis of relevancy, asserting that the document failed to reflect whether the listed employees were fluent in a secondary language. (See Tr. p. 112). Ms. Valbrun, however, provided extensive testimony about the spreadsheet's relevance, which should have been plainly obvious given the nature of the underlying arguments in this case. Counsel for the Employer subsequently laid a proper foundation for admitting it into evidence.

For some inexplicable reason, however, the Hearing Officer focused on the fact that some of the names listed were highlighted, which has no bearing on the relevance of this particular exhibit. (See Tr. p. 113). The Hearing Officer then sustained the objection on relevance grounds, offering little in the way of rationale for his decision, at which point PCSI moved for placement in the rejected evidence file. As established on the record, this was not an adversarial proceeding, and Petitioner's Objection should have been overruled and Employer's Ex. 8 should have been admitted.

## **V. CONCLUSION**

*Gory* controls the outcome of this case. Consequently, PCSI was never operating under a burden to establish confusion in the polling area as a direct result of the interpreter's absence. Rather, the majority in *Gory* made clear that the absence of an interpreter, for even a portion of the polling period, would have compelled an invalidation of the election results by operation of law. Through credible and largely unrebutted documentary and testimonial evidence, however,

PCSI has shown not only that the interpreter's absence for the entire polling period had a tendency to induce confusion among a majority of Creole-speaking employees (who comprised a majority of the bargaining unit), but that it did in fact do so.

More importantly, PCSI fully met its burden of establishing that the Region's failure to secure the presence of an interpreter pursuant to its agreement cast reasonable doubt as to the fairness and validity of the underlying election. The Board's failure to provide a Creole-speaking interpreter was a grievous error that deprived an overwhelming number of Creole-speaking employees of a full and fair opportunity to understand the voting process. The presence of an interpreter was necessitated by the demographic figures establishing that approximately 70-75% of the bargaining unit speaks Creole as a primary language and, for many, it is their only language.

Voters were clearly expecting the presence of a Creole-speaking interpreter during the election, and they had every right to. (*See* Tr. p. 184). The absence of such an interpreter had a tendency to, and did in fact result in mass confusion within the polling area and in the destruction of laboratory conditions required for a fair election. More importantly, the record evidence presented by PCSI, virtually all of which went unrebutted, operates to cast reasonable doubt upon the fairness and validity of the underlying election.

The essence of these objections goes to the Board agent's failure to maintain and protect the integrity of the voting process. The Board is charged with facilitating the expression of the employees during the voting process and should take every reasonable step to do so. By failing to provide an interpreter, the Region failed to protect the effective and informed expression by all of the employees of their voting desires.

The re-running of an election is not an unduly expensive or onerous remedy under the instant circumstances, nor would it be prejudicial to the Union. Therefore, as set forth above, the Region must reject the Hearing Officer's findings, conclusions, and recommendations regarding the Region's objectionable misconduct as outlined in Objections 6, 9, and 10, and further set aside the results of the underlying election.

Date: February 24, 2015

Respectfully submitted,

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

**PRE-CAST SPECIALITIES, INC.**

**Employer,**

**and**

**CONSTRUCTION AND CRAFT WORKERS  
LOCAL UNION No. 1652**

**Petitioner.**

**Case No. 12-RC-139665**

**CERTIFICATE OF SERVICE**

I, do hereby certify that I have on this 24th day of February, 2015, served a copy of the Employer's Brief in Support of Exceptions to Hearing Officer's Report on Objections and Recommendation to the Regional Director upon the following by email:

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